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Office of Administrative Law Judges
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Issue Date: 14 October 2004

Case No. 2004 LHC 00664

OWCP No. 5-117501

In the Matter of

ALBERT A. GAILLIARD,
Claimant
v.

ATLANTIC TECHNICAL SERVICES,
Employer.

Appearances:
Gregory E. Camden, Esq., for Claimant
Dana Adler Rosen, Esq., for Employer

Before:
RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for temporary total disability and temporary partial disability from an injury alleged to have been suffered by Claimant, Albert A. Gailliard, covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq*. (Hereinafter referred to as the "Act"). Claimant alleges that he endured laborious working conditions while employed by Employer, Atlantic Technical Services; and that as a result the arthritis in his knee was aggravated and his need for total knee replacement was accelerated.

The claim was referred by the Director, Office of Workers' Compensation Programs to the Office of Administrative Law Judges for a formal hearing in accordance with the Act and the regulations issued thereunder. A formal hearing was held on July 22, 2004. (TR. at 1).[1] Claimant submitted eight exhibits, identified as CX 1 through CX 3 and CX 6 through CX 10, which were admitted without objection (TR. at 13). Employer submitted nine exhibits, EX 1 through EX 9, which were admitted without objection (TR. at 14). The record was held open until September 27, 2004 for submission of briefs. (TR. at 46). Employer submitted its brief on September 28, 2004. Claimant likewise submitted his brief on September 28, 2004. Employer submitted a reply brief on October 4, 2004.

[1] EX - Employer's exhibit; CX- Claimant's exhibit; and TR - Transcript.

The findings and conclusions which follow are based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES

The following issues are disputed by the parties:

1. Whether Claimant is entitled to temporary total disability from July 7, 2003 to December 16, 2003, inclusive, and temporary partial disability benefits from December 17, 2003 to April 2, 2004, inclusive;

2. Whether Employer timely filed a Notice of Controversion.

STIPULATIONS

At the hearing, Claimant and Employer stipulated the following:

1. That an employer/employee relationship existed at all relevant times;

2. That the parties are subject to jurisdiction of the Longshore and Harbor Workers' Compensation Act;

3. That the claimant alleges an injury to his right knee with a date of diagnosis of October 29, 2003;

4. That a timely claim for compensation was filed by the employee.

5. That the Office of Worker's Compensation Programs wrote to the Employer on November 19, 2003, notifying the Employer that a claim has been filed and attached a copy of that claim in a letter to the Employer;

6. That the claimant's average weekly wage at the time of his injury was $1,360.88, resulting in a compensation rate of $907.25;

7. If the Administrative Law Judge agrees that the claimant suffered a compensable injury, the parties agree that the claimant's temporary partial rate for the time period of December 17, 2004 to April 2, 2004 is $192.22;

8. Dr. Marlow is the claimant's treating physician for this injury.

(JX 1).

DISCUSSION OF LAW AND FACTS

Testimony of Claimant

Claimant is a forty-four year old male who was previously employed by Employer for approximately nine years as a container repairman. (TR. at 19). Claimant testified to the laborious nature of his employment, and noted that his job responsibilities required him to often kneel on concrete. The length of time Claimant was required to kneel varied with the activities with which he was engaged. Claimant testified that at times he would be required to kneel "all day," for a period of eight hours. (TR. at 21-22). Claimant also stated that his job often required him to climb ladders and scaffolding. (TR. at 22). Though Claimant generally worked off the scaffolding when required to complete a task at a height, Claimant noted that at times he would have to work off of the ladder if both of the scaffoldings in the shop were occupied. (TR. at 23). Claimant approximated that, again depending on the particular job upon which he was working, he would climb either a ladder or scaffolding two to three times a day. (TR. at 23). The height of his climb varied, and at times could reach approximately eight to nine feet. (TR. at 23). On average, Claimant estimated that he would work from these heights for two to three hours. (TR. at 23). Claimant additionally testified that his other job responsibilities required him to work in the squatting position for an hour to an hour and a half. (TR. at 23). Claimant stated that he worked eight hours a day, the bulk of which was spent either standing, squatting or kneeling. (TR. at 24). Claimant testified that he spent very little time at work sitting. (TR. at 24).

Claimant testified that he began experiencing knee pain approximately five years prior to his testimony. (TR. at 24). Claimant discussed his knee problems with Ms. Marnie Stevens, a manager for Employer. (CX 9). In 1999, Claimant consulted Dr. Wilson, his primary care physician, regarding this pain. Dr. Wilson referred Claimant to Dr. Luciano-Perez, an orthopedic doctor, in January of 2001. (TR. at 25). Claimant testified that Dr. Luciano-Perez drew fluid out of his knee, but it eventually became unable to help Claimant with this treatment. Dr. Luciano-Perez then referred Claimant to Dr. Marlow. (TR. at 25). Claimant agreed on cross that he informed both of these doctors that he did not have a history of trauma to his knee. (TR. at 32).

Claimant testified that his initial treatment with Dr. Marlow consisted of injections administered during several appointments and lasted for a little over a year. (TR. at 25). Claimant testified that although the injections helped for a short period of time following each visit, it never lasted. Thus, Dr. Marlow performed a total knee replacement on Claimant on July 7, 2004. (TR. at 25). Claimant stated that prior to this surgery, he had never missed worked because of his knee injury. (TR. at 25). Claimant agreed on cross that he visited Dr. Marlow six times following his surgery. (TR. at 32). It wasn't until Claimant's last visit did Claimant ask Dr. Marlow's opinion of whether his employment aggravated his knee injury. (TR. at 33). Upon this request, Dr. Marlow opined that it did.

Claimant testified that he attempted to return to his job with Employer in November of 2003 following his surgery. Claimant stated that he informed Ms. Stevens, a manager of Employer, that Dr. Marlow had released him for work. (TR. at 26). Claimant learned from Ms. Stevens that Employer would require him to have a doctor's note detailing his restrictions. (TR. at 26). Claimant testified that upon his request, Dr. Marlow drafted a letter containing

Claimant's restrictions, which Claimant submitted to Employer. (TR. at 26). Claimant testified that Employer did not permit him return to work once it was informed of his restrictions. (TR. at 27).

Claimant testified that he then placed his name on the 1970 call board in hopes of finding work. (TR. at 27). Claimant is a member of Local 1970 within the International Longshoremen's' Association and explained that the 1970 call board is a way for members of the Local to acquire work. . (TR. at 18). Every Friday, Claimant would place his name on the Call List, noting that he was available for work. Available jobs would be dispatched according to the seniority of those listed on the Call List. Claimant described the seniority system as having call cards assigned depending on when a person came into Local 1970. For instance, A cards were assigned to those with most seniority, B cards to those with the next highest seniority, et cetera. Claimant testified that he held an H card, meaning that he would only get work after the jobs were offered to those holding A – G cards. (TR. at 28). Claimant testified that the dispatched jobs varied in length, and could last anywhere from one day to one week to indefinite period. (TR. at 29).

Claimant testified that he consistently began picking up work via the call board on December 17, 2003 with Virginia International Terminals (VIT). (TR. at 29). Claimant stated that he inspects containers for VIT. Claimant testified that this position differs from that he held with Employer because it requires neither heavy lifting nor kneeling, and falls within the restrictions placed on him by Dr. Marlow. (TR. at 30). Claimant stated that he eventually hoped to become a full-time employee of VIT. (TR. at 33).

Medical Evidence

Claimant initially consulted his primary care physician, Dr. Kevin Wilson, regarding his knee pain in 1999. Dr. Wilson referred Claimant to Dr. Ernesto Luciano-Perez, an orthopedist, in 2001. Dr. Luciano-Perez diagnosed Claimant with degenerative arthritis to the right knee, and recommended injections of Synvics to the knee, which Claimant received until August of 2002. (CX 2-1). Dr. Luciano-Perez's notes dated May 1, 2003 recorded that the Synvisc only lasted for four months, and that Claimant still had significant knee pain that caused him difficulty in performing his job. (CX 2-12) Dr. Luciano-Perez opined, "[Claimant] is still very young to consider having surgery, but he is in so much pain that we may not have a choice." (CX 2-12).

Dr. Luciano-Perez then referred Claimant to Dr. Aaron Marlow, a Canadian board certified orthopedic surgeon, in 2003. Dr. Marlow diagnosed Claimant with end-stage degenerative arthritis involving the medial and patella femoral articulation. Dr. Marlow stated that he examined x-rays to determine the severity of Claimant's arthritis. After determining that Claimant suffered from a high level of arthritis, Dr. Marlow opined that this was an uncommon occurrence for someone as young as Claimant. (Marlow Depo. at 7). Dr. Marlow noted that they discussed the conditions of Claimant's employment. Dr. Marlow concluded:

> Certainly it is not appropriate for [Claimant] to doing activities that pound the knee. He is not appropriate to do very much kneeling. Ladders and stairs are only appropriate occasionally.

(CX 1-1).

On July 7, 2003, Dr. Marlow performed a total knee replacement on Claimant. Claimant visited Dr. Marlow approximately six times following his surgery. On his sixth and final visit dated October 29, 2003, Dr. Marlow examined Claimant and noted that his range of motion is "very good." (CX). Dr. Marlow also recorded that Claimant's flexicon was "excellent" and his quadriceps strength was "actually much improved." Dr. Marlow concluded that Claimant could work, but should not crawl or stoop, no jostling motions, and could only use stairs on occasion. (CX 1-10). Dr. Marlow explained these restrictions in his deposition:

> [I]f [Claimant] was doing a lot of kneeling, there'd be increase stresses between the artificial patella and the prosthesis of the total knee replacement. That can hasten failure and loosening and wear of the replacement. Also running, heavy twisting and crawling. Those are all things that we know will accelerate the wear and the failure of the replacement.

(EX 4; CX 10-11).

During this same October 29, 2003 visit, Claimant asked Dr. Marlow to opine the cause of his degenerative arthritis and his need for a total knee replacement. Dr. Marlow recorded the conversation in his notes:

> [Claimant] did ask me today whether or not he felt that his job, which entailed working on steel and kneeling for hours as a time as well as going up and down ladders and scaffolds contributed to his arthritis. Certainly, it is not known what causes arthritis but certainly heavy laborious manual labor jobs can accelerate the process of arthritis, and I do feel that his arthritis was hastened and worsened by his occupation.

(CX 1-11). Dr. Marlow reaffirmed this opinion in his deposition. Though Dr. Marlow could not pinpoint the precise cause of Claimant's arthritis, he agreed that Claimant's need for a knee replacement surgery was accelerated by his employment. (CX 10-8). Dr. Marlow testified, "The type of work that [Claimant] does certainly will exacerbate his preexisting conditions. Especially up and down stairs, kneeling, that will certainly exacerbate the symptoms of arthritis." (CX 10-7).

On October 29, 2003, Dr. Marlow also concluded that Claimant would not be permitted to resume his previous employment with Employer. Specifically, Dr. Marlow noted:

> This gentleman can work but certainly cannot go back to his previous occupation. He is not allowed to crawl or stoop. He is not allowed to do any jostling type motions and stairs are acceptable on occasion.

(CX 1-10).

Dr. Cohn, an American board certified orthopedic surgeon, examined Claimant on April 29, 2004, upon the request of Employer. Dr. Cohn considered Claimant's history, prior treatment for his knee, and total knee replacement for degenerative arthritis. Dr. Cohn concluded that Claimant's work did not cause his arthritis. (EX 1) . Dr. Cohn additionally opined that while Claimant's working conditions could exacerbate his arthritis, and cause it to become more symptomatic, Claimant would have had the same regardless of his work as a container repairman with Employer. (EX 1). Dr. Cohn focused on the fact that Claimant only had problems with his knees for five years, which the doctor considered to be a short duration. Dr. Cohn opined that this discounted any relationship between Claimant's work for Employer and his knee injury:

> If he had a period of many years of intermittent swelling, pain, and perhaps even injures which he continued to work through, this could have aggravated his condition. However, by history, he has had a relatively short period of time over which he was symptomatic, and in my opinion to a degree of medical certainty is that his arthritis of his right knee was not materially caused or accelerated by his employment.

(EX 1).

Dr. Cohn testified in a deposition that he could rule out to a reasonable degree of medical certainty that Claimant's heavy manual labor as a contributing factor to his need for a total knee replacement. (Cohn Depo. at 8). Dr. Cohn opined that some individuals are predisposed to develop degenerative arthritis, and may require total knee replacement regardless of the physical requirements of his or her employment. (Cohn Depo. at 9 – 10).

Testimony and Report of Barbara Byers, Vocational Consultant

Ms. Byers is a licensed professional counselor in both Virginia and North Carolina. Additionally, Ms. Byers holds nationally certified as an OWCP rehabilitation counselor, vocational evaluator and a certified case manager. Ms. Byers' holds a bachelor's degree in psychology and a master's degree in rehabilitation counseling as post graduate work in psychology.

Ms. Byers testified that she met with Claimant on March 12, 2004, and conducted a standard vocational diagnostic interview. (TR. at 36). Ms. Byers stated that she reviewed Claimant's current medical status, work history, education, training and interests. Additionally, Ms. Byers conducted vocational testing of Claimant, which included a wide range achievement test focused on reading and arithmetic, and a general ability measure for adults, which is a nonverbal IQ test. (TR. at 36). Finally, Ms. Byers stated that she considered Claimant's physical restrictions in reaching her conclusions. (TR. at 36).

Ms. Byers' task was to determine if suitable alternative employment on the open market was available for Claimant during the time period of October 29, 2003 until December 16, 2003. Ms. Byers testified she investigated potential employment located within the same geographical region as Claimant's previous employment and that the considered positions included cashier, dispatcher, call taker, security officer, meter monitor, and driver. (TR. at 38). Ms. Byers stated

that these kinds of jobs were within Claimant's restrictions, and were available from October to December. Thus, Ms. Byers opined that had Claimant applied for the aforementioned positions, Claimant would have been considered because of his education, skills, and restriction level. (TR. at 38). The positions suggested by Ms. Byers listed salaries ranging from $6.40 an hour to $11.23 an hour. (EX 6). Ms. Byers testified that it is reasonable to conclude that Claimant could have obtained a position for at least $10 and hour. (TR. at 38).

Ms. Byers stated that at the time she interviewed Claimant he was working as a terminal checker for ILA, and was being paid $27.00 and hour. On cross examination, Ms. Byers agreed that the first step in determining if a person can return to work is contacting his previous employer. Ms. Byers stated that "if the person can go back to work with the employer that he was working before he had to leave work for whatever reason, then that is a much better rehab outcome than looking for a new employer." (TR. at 39-40). Ms. Byers thus agreed that it was reasonable for Claimant to attempt to go back to work with Employer upon his medical release. (TR. at 40). Ms. Byers agreed with the hypothetical that if the employer wanted clarification from the person's doctor, than it would be reasonable for the person to take the time to provide the employer with the requested information. (TR. at 41). Ms. Byers stated that while doctors likely would not provide this information overnight, they generally have a quick turnaround for these requests. (TR. at 41).

Ms. Byers additionally agreed on cross that it was reasonable for Claimant to put his name on the call board with the Local in search of employment. (TR at 41). While on the stand, Ms. Byers was informed that Claimant was out of work for seven weeks before he began work. It then took four months for Claimant to resume working at his pre-injury wages. (TR. at 43). Ms. Byers agreed that, assuming that Claimant was putting his name on the call board on a regular basis, this was a reasonable approach for Claimant to take in securing alternative employment. (TR. at 43). Ms. Byers also conceded that Claimant's current position had obtained via the call log is higher paying than any of the positions she suggested were available. (TR. at 43).

Section 20(a) Presumption

Section 20(a) of the Act, 33 U.S.C. § 920(a), creates a presumption that a claimant's disabling condition is causally related to his employment. In order to invoke the section 20(a) presumption, a claimant must prove that he suffered a harm and that conditions existed at work or an accident occurred at work that could have caused, aggravated or accelerated the condition. *Merrill v. Todd Pacific Shipyards, Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990). Claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case and the invocation of the § 20(a) presumption. *See Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom, Sylvester v. Director, OWCP*, 681 F.2d 359, 14 BRBS (5th Cir. 1982). Once the claimant has invoked the presumption, the burden of proof shifts to the employer to rebut it with substantial countervailing evidence. *Merrill*, 25 BRBS at 144. If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935).

To invoke the Section 20(a) presumption, all that a claimant must show is that he suffered a harm and that employment conditions existed or a work accident occurred that could have caused, aggravated, or accelerated his condition. The parties have stipulated that Claimant's employment is subject to coverage under the Longshore and Harbor Worker's Compensation Act.

Claimant argues in his post-hearing brief that he has sustained his burden of proof and established a *prima facie* case of disability through his testimony regarding his working conditions with Employer. As a container repairman, Claimant testified that he performed the majority of his employment duties in kneeling or squatting position, and remained in this position for hours at a time. (TR. at 18). Claimant stated that out of each eight hour work shift, he spent little time sitting. (TR. at 19). Claimant additionally testified that over the course of his employment, he was regularly required to climb ladders and scaffolding on daily basis. (TR. at 23). Claimant argues that this repetitive use of his knee in positions such as kneeling, squatting, crouching, and climbing aggravated his knee problems, and accelerated his need for a total knee replacement.

Medical records support the proposition that Claimant's working conditions under Employer aggravated and accelerated his knee problems. Dr. Marlow, Claimant's treating orthopedic physician who performed Claimant's total knee replacement, opined that Claimant's arthritis was "hastened and worsened by his occupation." (CX 1-11). Dr. Marlow explained that the "type of work that [Claimant] does certainly will exacerbate preexisting conditions. Especially up and down stairs, kneeling, that will certainly exacerbate the symptoms of arthritis." (CX 10-7). Dr. Marlow further concluded that Claimant's work accelerated his need for total knee replacement surgery. (CX 10-8).

Employer argues that Claimant has not established a *prima facie* case to invoke the presumption. In support of this assertion, Employer notes that both Dr. Cohn and Dr. Marlow agree that the initial cause of Claimant's arthritis is unknown, and the fact that Dr. Marlow agreed that total knee replacements are not limited to people who perform manual labor. However, Employer misinterprets the requirements of the invocation of the Section 20 presumption. Simply put, to invoke the presumption, all that a claimant must show is that he suffered harm and that employment conditions existed that could have caused, **aggravated**, or **accelerated** his condition. Claimant credibly testified regarding the laborious working conditions during his employment with Employer. Dr. Marlow unequivocally acknowledged such conditions as both an **aggravating** factor of Claimant's knee problems and as an **acceleration** of Claimant's need for the total knee replacement. Contrary to Employer's reading of the requirements to invoke the presumption, Claimant is not required to prove the initial cause of his arthritis, and has sufficiently met the burden of establishing that employment conditions existed that could have **aggravated** or **accelerated** his condition.

Upon consideration of the evidence as well as the stipulations entered into by the parties, I find that Claimant has established a *prima facie* case for compensation and is entitled to the presumption of Section 20(a) that his condition is causally related to his working conditions.

The burden thus shifts to Employer to rebut the presumption with substantial countervailing evidence.

Rebuttal of Section 20(a) Presumption

Since the presumption is invoked, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence which establishes that the claimant's employment did not cause, contribute to or aggravate his condition. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989); *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. *E & L Transport Co., v. N.L.R.B.*, 85 F.3d 1258 (7th Cir. 1996).

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by § 20(a). *See Smith v. Sealand Terminal*, 14 BRBS 844 (1982). Rather, the presumption must be rebutted with specific and comprehensive medical evidence proving the absence of, or severing, the connection between the harm and employment. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990). If the administrative law judge finds the Section 20(a) presumption is rebutted, he must weigh all the evidence and resolve the causation issue based on the record as a whole. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984); *Devine v. Atlantic Container Lines, G.T.E., et. al.*, 25 BRBS 15, 21 (1991). When the evidence as a whole is considered, the proponent of the evidence has the burden of proof. *See Director, OWCP v. Greenwich Colleries,*114 S.Ct. 2251, 28 BRBS 42 (CRT) (1994).

Employer argues that the Section 20(a) presumption has been rebutted based upon Dr. Cohn's findings that Claimant's working conditions neither aggravated his arthritis nor accelerated his need for a total knee replacement. After examining Claimant, and reviewing Claimant's history, prior treatment for his knee, and total knee replacement for degenerative arthritis, Dr. Cohn concluded that Claimant's work did not cause his arthritis. (EX 1). Dr. Cohn opined that while Claimant's working conditions could exacerbate his arthritis, Claimant would have had the same symptoms had he not worked as a container repairman with Employer. (EX 1). Dr. Cohn testified in a deposition that he could rule out to a reasonable degree of medical certainty that Claimant's heavy manual labor as a contributing factor to his need for a total knee replacement. (EX 3). Dr. Cohn noted that some individuals are predisposed to develop degenerative arthritis, and may require total knee replacement regardless of the physical requirements of his or her employment. (EX 3). Thus, Employer argues that the Section 20(a) presumption has been rebutted by the aforementioned medical evidence that ultimately concludes Claimant's employment did not cause, contribute to, or aggravate his condition.

Claimant asserts that Employer has not rebutted the Section 20(a) presumption with sufficient or substantial evidence. Claimant notes that Dr. Cohn is a non-treating physician hired by Employer to render an opinion in this matter. Claimant argues that Dr. Cohn's opinion is "wishy-washy" because he acknowledges that Claimant's working conditions could have exacerbated his condition, but then unequivocally stated in this very opinion that "Claimant would have had the same symptoms as he would have had he not worked as a container repairman with Employer." (EX 1). Dr. Cohn ultimately concluded "to a degree of medical

certainty is that [Claimant's] arthritis of his right knee was not materially caused or accelerated by his employment." (EX 1). Dr. Cohn also agreed that Claimant's heavy manual labor was not a contributing factor to his need for total knee replacement. (EX 3).

It is well established that "[t]he unequivocal testimony of a physician that no relationship exists between a claimant's disabling condition and the claimant's employment is sufficient rebuttable evidence" to overcome the Section 20(a) presumption. *Flood v. NAF Billeting Branch*, 134 F.3d 363 (4th Cir. 1998) (table decision) (citing *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129-30 (1984)). Dr. Cohn concluded after an examination of Claimant and a review of Claimant's medical records that there is no causal relationship between Claimant's working conditions and his knee disability. Additionally, Dr. Cohn opined that Claimant would have required a total knee replacement regardless of his employment conditions. Because of this unequivocal medical testimony, I find that Employer has presented substantial evidence, which if credited, could establish that the Claimant's working conditions did not accelerate or aggravate his disability. Therefore, I find that the Employer has rebutted the Section 20(a) presumption.

Weighing the Evidence

As stated above, because the presumption no longer controls, the evidence must now be examined and weighed as to the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935). The presumption "never had and cannot acquire the attribute of evidence in the claimant's favor." *Id*. Therefore, it must be determined whether Claimant has shown by a preponderance of the evidence that the alleged injury is causally related to his employment with Employer. 5 U.S.C. §556(d) (2002); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 277 (1994) (citing *Steadman v. SEC*, 450 U.S. 91, 95 (1981)); *Devine v. Atl. Container Lines, G.I.E.*, 25 BRBS 16, 20-21 (1990).

As to the issue of causation, Claimant argues that his arthritis was aggravated and his need for total knee replacement was accelerated through repetitive strenuous use of his knee during the course of his employment with Employer. Claimant testified that his job responsibilities often required him to kneel on concrete, at times for a period of eight hours. (TR. at 21-22). Claimant also stated that his job often required him to climb ladders and scaffolding, on average two to three times a day. (TR. at 23). Claimant additionally testified that a portion of his job responsibilities required him to work in the squatting position for an hour to an hour and a half. (TR. at 23). Claimant worked eight hours a day, and testified that he spent the bulk of this time either standing, squatting or kneeling. (TR. at 24). Thus, Claimant asserts that these employment conditions caused his arthritis to become more symptomatic and problematic, accelerating his need for a total knee replacement.

Claimant has also offered his medical records from his course of treatment with Dr. Marlow, a Canadian board certified orthopedic surgeon who performed Claimant's total knee replacement. Dr. Marlow opined that Claimant's arthritis was "hastened and worsened by his occupation." (CX 1-11). Dr. Marlow explained that the "type of work that [Claimant] does certainly will exacerbate preexisting conditions. Especially up and down stairs, kneeling, that will certainly exacerbate the symptoms of arthritis." (CX 10-7). Dr. Marlow further concluded that Claimant's work accelerated his need for total knee replacement surgery. (CX 10-8).

As evidence that Claimant's arthritis was not aggravated, and his need for total knee replacement was not accelerated by his employment, Employer has offered the medical reports of Dr. Cohn. Dr. Cohn is a board certified orthopedist who examined Claimant only once at the request of the Employer. Dr. Cohn also considered Claimant's history, prior treatment for his knee, and total knee replacement for degenerative arthritis in concluding that Claimant's work did not cause his arthritis. (EX 1). Dr. Cohn stated that Claimant's working conditions could exacerbate his arthritis and cause it to be more symptomatic, but ultimately concluded that Claimant would have had the same symptoms as he would have had he not worked as a container repairman with Employer. (EX 1). Dr. Cohn testified in a deposition that he could rule out to a reasonable degree of medical certainty Claimant's heavy manual labor as a contributing factor to his need for a total knee replacement. (EX 3). Dr. Cohn noted that some individuals are predisposed to develop degenerative arthritis, and may require total knee replacement regardless of the physical requirements of his employment. (EX 3).

Upon consideration of all of the evidence, I find that Claimant has established by a preponderance of the evidence that the problems he experienced with his left leg were the result of the March 29, 2002, injury. In reaching this conclusion, I find that Dr. Marlow's opinion is entitled to greater weight than the opinions of Drs. Cohn. Dr. Marlow is Claimant's treating physician and performed Claimant's total knee replacement. Dr. Marlow additionally examined Claimant over the course of several visits, while Dr. Cohn only met with Claimant once at the request of Employer.

Concededly, both doctors possess impressive credentials. Dr. Marlow is a board certified orthopedic surgeon who focuses mainly on total joint replacement in his practice, and has performed approximately 350 to 370 of such procedures. (EX 4; CX 10-15). Dr. Cohn is additionally board certified and specializes in sports medicine. Although both doctors are board certified, Employer seems to imply that Dr. Marlow's Canadian certification is somehow inferior to the American certification of Dr. Cohn. This argument is entitled to no weight because Employer has not produced any evidence of the superior qualifications required of an American certification as opposed to a Canadian certification, and has failed to offer any evidence that would suggest a mere incompetence on behalf of Dr. Marlow.

It is important to note that Dr. Cohn was unaware when asked if he reviewed Claimant's x-rays when rendering his opinion. Specifically, Dr. Cohn testified, "If I did [review Claimant's x-rays], it wasn't pertinent to what I was being asked." (EX 3). Dr. Cohn then agreed that he was unaware of the level of arthritis in Claimant's knee at the time of his total knee replacement. (EX 3). It seems Dr. Cohn faced a difficult task in opining whether or not Claimant's employment aggravated, and thus increased, the amount of arthritis in Claimant's knee, when Dr. Cohn was completely unaware of the precise extent of Claimant's arthritis prior to his knee replacement. In sum, Dr. Cohn was able to conclude that years of squatting, kneeling and climbing could not have possibly aggravated Claimant's arthritis, without being certain as to the extent of arthritis from which Claimant suffered. Additionally, Dr. Marlow felt that the x-ray was "an important part of the treatment plan for the patient." (CX 10-9). Dr. Marlow testified that he reviewed Claimant's x-ray to determine that Claimant was at stage end arthritis. (CX 10-7). Possession knowledge of the severity of Claimant's arthritis prior to surgery, Dr. Marlow

opined that this was an unusual amount of arthritis for a person as young as Claimant. This supports Dr. Marlow's opinion that Claimant's employment duties aggravated his arthritis, thus causing it to be more severe than what it would have been absent the working conditions. Dr. Marlow's opinion is thus entitled to more weight than the Dr. Cohn's opinion rendered without a memorable examination of Claimant's x-ray.

Finally, though he ultimately concluded that there was no causal connection between Claimant's employment and his disability, Dr. Cohn initially acknowledged that Claimant's working conditions could have exacerbated Claimant's condition. Specifically, Dr. Cohn stated in a letter addressed to Employer's counsel dated April 28, 2004:

> The question being posed is whether [Claimant's] work as a container mechanic caused or accelerated the arthritis in his knee. There is no definite evidence that work of this type causes arthritis. **I do believe it exacerbated his arthritis and caused it to be more symptomatic.** However, were he to stop working, he most likely would have been at the same symptoms as he would have been had he not worked at that job at all.

(EX 1).

Dr. Cohn later testified in a deposition taken on June 9, 2004, that he could rule out Claimant's employment as a contributing factor for his total knee replacement, and agreed that it did not accelerate his arthritis (EX 3, page 8). Thus, Dr. Cohn concluded that Claimant's employment duties did exacerbate, but did not accelerate, Claimant's knee problems. "Exacerbation", as defined by Dorland's Illustrated Medical Dictionary[2], is an "increase in the severity of a disease or any of its symptoms." Though not defined by the medical dictionary, The Random House College Dictionary[3] defines "aggravate" as "to make worse or more severe" and defines "exacerbate" as "aggravate." Therefore, I find that Dr. Cohn has at least diagnosed that the Claimant's pre-existing arthritis was aggravated by his employment duties.

Therefore, upon consideration of all of the evidence, I find that Claimant has established by a preponderance of the evidence that his working conditions under Employer aggravated his arthritis and contributed to his need for total knee replacement. Thus, I find that Claimant's disability is causally related to his employment.

Nature and Extent of Disability

Claimant in this case seeks temporary total disability from July 7, 2003 to December 16, 2003, inclusive and temporary partial disability benefits from December 17, 2003 to April 2, 2004, inclusive. The parties have stipulated that if the Administrative Law Judge agrees that Claimant suffered a compensable injury, Claimant's temporary partial rate for the time period of December 17, 2004 until April 2, 2004 is $192.22. (JX 1). Therefore, I find that from December

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[2] *Dorland's Illustrated Medical Dictionary*, Philadelphia: W.B. Saunders Company, 1981.

[3] *The Random House College Dictionary, Revised Edition,* New York: Random House, Inc., 1980.

17, 2004 to April 2, 2004, the Claimant is entitled to temporary partial disability compensation at the rate of $192.22 per week. However, the issue remains whether Claimant is entitled to temporary total disability benefits from July 7, 2003 until December 16, 2003.

To establish a *prima facie* case of total disability, a claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Trans-State Dredging v. Benefits Review Bd., 731 F.2d 199, 200 (4th Cir. 1984); Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP, 592 F.2d 762, 765 (4th Cir. 1979); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339, 342-43 (1988); Elliott v. C & P Tel. Co., 16 BRBS 89, 92 (1984). A claimant's credible testimony alone, without objective medical evidence, on the issue of the existence of a disability may constitute a sufficient basis for an award of compensation. Eller & Co. v. Golden, 620 F.2d 71, 74 (5th Cir. 1980); Ruiz v. Universal Mar. Serv. Corp., 8 BRBS 451, 454 (1978). Once claimant cannot return to his usual work, he has established a *prima facie* case of total disability, and the burden shifts to the employer to establish the availability of suitable alternate employment. *Trans-State Dredging v. Benefits Review Bd*., 731 F.2d 199, 200 (4th Cir. 1984); *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993).

Where it is uncontroverted that a claimant cannot return to his usual work, he has established a *prima facie* case of total disability, and the burden shifts to the employer to establish the availability of suitable alternate employment. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). To do so, the employer must show the existence of realistic job opportunities which the claimant is capable of performing, considering his age, education, work experience, and physical restrictions. *New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). If the employer satisfies its burden, then the claimant, at most, may be partially disabled. *See, e.g., Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (9th Cir. 1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986). However, the claimant can rebut the employer's showing of the availability of suitable alternate employment, and retain eligibility for total disability benefits, if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. *Newport News Shipbuilding & Dry Dock Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

Claimant has made a *prima facie* showing that he was totally disabled from July 7, 2003 to December 16, 2003. Claimant underwent knee replacement surgery on July 7, 2003 and was unable to work at all until Dr. Marlow medically released him to work on October 29, 2003. (CX 1-10). Additionally on October 29, 2003, Dr. Marlow also concluded that Claimant would not be permitted to resume his previous employment with Employer. Dr. Marlow imposed restrictions that prevented Claimant from crawling or stooping. Claimant is not allowed to do any jostling type motions and stairs are acceptable on occasion. (CX 1-10). Regardless, Claimant testified that he attempted to return to his job with Employer in November of 2003 by informing Ms. Stevens, a manager for Employer, that Dr. Marlow had released him for work. However, Claimant was unable to return to his previous employment because of his restrictions. (TR. at 26). Thus, Claimant has established a *prima facie* case of total disability and the burden

therefore shifts to Employer to show suitable alternative employment.

Employer argues that Claimant is not entitled to total disability benefits because Employer has met the burden of establishing suitable alternative employment Claimant could have pursued after he was medically released, during the period of October 29, 2003 to December 16, 2003. Employer cites to the Labor Market Survey completed by Ms. Barbara Byers. Ms. Byers located over 26 jobs within Claimant's restrictions that were available over this time period. The survey additionally establishes that Claimant had a wage earning capacity of $10.00 and hour. (Tr. at 44). Claimant stipulates that the jobs listed in the Labor Market Survey are within his restrictions and education. (JX 1). Therefore, Employer has met its burden of suitable alternative employment.

Claimant rebuts that he remains entitled to total disability benefits for October 29, 2003 to December 16, 2003 because he diligently pursued alternate employment opportunities but was unable to immediately secure a position. Employer argues that the fact that Claimant was able to obtain a position on December 17 evidences that he could have done so earlier. This argument is without merit as I find that the Claimant diligently sought employment prior to December 17, though was unsuccessful. Claimant testified that he initially attempted to return to his former job with Employer in November of 2003 following immediately following his medical release. (TR. at 26). However, Claimant was unable, as the job requirements exceeded his restrictions. (TR. at 27). Claimant testified that he then placed his name on the 1970 call board in hopes of finding work. (TR. at 27). Claimant explained that, consistent with standard procedure, he placed his name on the list every Friday between 6:00 and 8:00. (TR. at 27). The jobs were dispatched according to seniority, and Claimant would only get to work after those in line above him were assigned a position. (TR at 29). Despite his persistent effort, Claimant did not obtain a regular position until December 17, 2003, and did not actually return to his pre-surgery wage earning capacity until April 2, 2004. Claimant is still required to utilize the Call Log to maintain this position, Claimant hopes to eventually be hired on with VIT full time. (TR. at 33).

Ms. Byers, Employer's own witness, agreed that Claimant took a reasonable step in putting his name on the call board with the Local. (TR at 41). While on the stand, Ms. Byers was informed that Claimant was out of work for seven weeks before he began work. It then took four months for Claimant to resume working at his pre-injury wages. (TR. at 43). Ms. Byers agreed that, assuming that Claimant was putting his name on the call board on a regular basis, Claimant acted reasonably in pursuing employment upon his medical release. (TR. at 43). Ms. Byers also conceded that Claimant's current position obtained via the call log, which pays $27 and hour, is significantly more profitable for Claimant than any of the positions she suggested in the Labor Market Survey. (TR. at 43).

Though Employer has met its burden of demonstrating suitable alternative employment, I find Claimant to be totally disabled because from October 29, 2003 until December 16, 2003 because Claimant diligently pursued alternate employment opportunities but was unable to secure a position. I additionally find that Claimant was totally disabled after his surgery on July 7, until his medical release on October 29, 2003. Thus, Claimant is entitled to temporary total disability benefits for the entire period between July 7, 2003 to December 16, 2003. Per the parties' stipulations, Claimant is also entitled to temporary partial disability benefits from

December 17 until April 2, 2004.

Section 14(e) Penalty

Claimant has requested that a penalty be imposed against Employer for failure to file a timely Notice of Controversion following notice of the claim. Section 14(a) of the Act requires that an employer must pay compensation except where the employer controverts liability. Section 14 (e) of the Act provides:

> If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subsection (b) of this section, there shall be added to such unpaid installment as amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for payment.

33 U.S.C. § 914 (e). The Board has held that in order to escape Section 14(e) liability, the employer must pay compensation, controvert liability, or show irreparable injury. *Frisco v. Perini Corp., Marine Division*, 14 BRBS 798, 800 (1981).

By mandating a penalty of ten percent if an employer fails to either pay compensation or file a Notice of Controversion, Section 14(e) of the Act encourages the prompt payment of benefits, ensures that claimants receive the full amount due, and serves as an incentive to induce employers to bear the burden of bringing any compensation disputes to the Department of Labor's attention. *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184, 192 (1989) (en banc), *aff'd in pert. part sub nom.*, *Ingalls Shipbuilding v. Director, OWCP*, 898 F.2d 1088 (5th Cir. 1990); *Grant v. Portland Stevedoring Co*., 16 BRBS 267, 269 (1984), *on recon*., 17 BRBS 20 (1985). The Fourth Circuit has stated that the Section 14(e) "penalty is mandatory unless non-payment [or the failure to timely controvert] is due to conditions beyond employer's control." *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167, 171 (4th Cir. 1978), *cert. denied*, 439 U.S. 979 (1978).

Based on the evidence, I find that Employer had notice of Claimant's disability on November 21, 2003. At the hearing, the parties stipulated that the Office of Worker's Compensation Programs wrote to the Employer on November 19, 2003, notifying the Employer that a claim has been filed and attached a copy of that claim in a letter to the Employer. (Tr. 15-16). Allowing two days for mail dates Employer's receipt of notice of Claimant's disability at November 21, 2003. Therefore, I find that the fourteen-day time limit in which to file a Notice of Controversion began to run on November 21, 2003.

Employer apparently argues that the time limit should be stayed until Employer became fully aware of all the facts surrounding Claimant's claim, regardless of the date Employer first had notice of the claim. Employer argues that once it had knowledge of the claimed injury (which I have found was on November 21, 2003) it performed its own internal investigation and

reviewed the nature of Claimant's employment, his medical records and the facts surrounding his claimed injury and need for total knee replacement. Employer thus argues that once it became aware of all of the facts, it "timely" filed its Notice of Controversion on January 21, 2004. This argument amounts to an assertion that the Employer was entitled to conduct an investigation at its leisure after being notified of the filing of the claim (the period from November 21, 2004, to January 7, 2004) before the 14 day time limitation began to run.

The penalty assessed in §14(e) is mandatory unless failure to timely controvert is due to circumstances beyond employer's control. However, the record contains no evidence that Employer's failure to controvert was beyond its control. Therefore, because the Employer's Notice of Controversion was not filed within fourteen days of notice that the Claimant had filed a claim for compensation, Employer is assessed a 10% penalty as mandated under §14(e) of the Act. This penalty is applied to all payments Claimant should have made from December 5, 2003 until January 21, 2004, the date the Employer filed its Notice of Controversion.

ORDER

Accordingly, it is hereby ordered that:

1. Employer, Atlantic Technical Services, is hereby ordered to pay to Claimant, Albert A. Galliard, compensation for temporary total disability from July 7, 2003 until December 16, 2003, inclusive, at the stipulated compensation rate of $907.25;

2. Employer, Atlantic Technical Services, is also hereby ordered to pay to Claimant, Albert A. Galliard, compensation for temporary partial disability, from December 17, 2003, through April 2, 2004, inclusive, at the stipulated rate of $192.22 per week;

3. Pursuant to §14(e), Employer is ordered to pay 10% penalty on all payments that were to be made from December 5, 2003 though January 21, 2004;

4. Employer is hereby ordered to pay all medical expenses related to Claimant's work related injuries;

5. Employer shall receive credit for any compensation already paid;

6. Interest at the rate specified in 28 U.S.C.§ 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed from the date each payment was originally due to be paid. See *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);

7. Claimant's attorney, within 20 days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.

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RICHARD E. HUDDLESTON
Administrative Law Judge